

October 2015



EUROPEAN POLICY BRIEF

The Better Regulation Package : Creating better regulations, but for what kind of EU politics ?

Fabian Willermain and Anca Cioriciu

Back in July 2015, we acknowledged the priorities established by the Luxembourg presidency, topped by ambitious cross-sectoral dossier of Better Regulation and the Interinstitutional Agreement negotiations. We investigated these issues through the lens of their “A Union for the Citizens” pledge.

With four months left, this promise to EU citizens still has much to deliver if it is to meet expectations. This paper is a mid-term look at the advances made with these dossiers.

Introduction

It is hard to overlook the fact that amid the many EU-wide crises that accumulated over the summer, the pace of discussions over the Better Regulation Package may have slowed. Nevertheless, the framework for the Functioning of the EU is still in need of refurbishment. Citizens feel estranged and perceive the EU as a slow and opaque generator of laws. This political culture needs to change. Efforts to bring the EU to citizens should

become the prevailing practice for the EU and its institutions, and, needless to say, national lawmakers. The strongest message is sent via transparency, integrity and reinforcement of accountability mechanisms as they allow citizens to ‘look in the kitchen of EU law-making’ as Frans Timmermans puts it. However, the kitchen still seems to have certain cupboards and storage rooms whose doors have been left merely ajar. This means that practices covering transparency issues remain elusive and inadequate for citizens and for the EU’s aspirations to legitimacy.

The better regulation agenda is composed of a set of tools which aim to improve the EU decision making process. Its main purpose is to ensure that EU legislation better serves citizens and businesses. It promises that the EU legislative process would be more transparent, open to stakeholder input and easier to follow. In order to achieve this aim, the Commission introduced a new agreement between the EU institutions, designed to make cooperation between them smoother and clearer.

The Interinstitutional Agreement

First of all, one of the main objectives of the Luxembourg presidency is to finalise the

negotiations on the update of the [Interinstitutional Agreement on Better Regulation](#), on the basis of the proposal submitted by the European Commission. The aim is to enable better interinstitutional cooperation, which should ensure the quality of legislation that takes the interests and needs of citizens into account.

Normally, an interinstitutional agreement pays significant attention to the first chapter, 'programming' and 'planning'. It envisages the work organisation of the three main EU institutions and in particular tries to coordinate their political programme.

Whereas the Commission pictured the Interinstitutional Agreement as the canvas for the Working Programme Agreement and as a dossier in its own right, a reality check shows that it is actually only part of the Better Regulation Agenda. Moreover, in his statement in the European Parliament plenary session ahead of the vote on the college, President Juncker mentioned the Interinstitutional Agreement only once and then in relation to the mandatory transparency register. This was a surprising shift that means that the Interinstitutional Agreement is no longer the number one priority but instead a simple tool of the Better Regulation Package. Moreover, we see no sign of transparency register diligence on the horizon. One of the reasons for the better regulation frenzy could be the negotiation with the United Kingdom, as this narrative gets a good response in London.

Nevertheless, it seems that the negotiations are much more complicated than official statements reveal. On the one hand, the timing might be somehow optimistic given that the political and institutional contexts have substantially changed since 2003 when the first agreement on better law-making was signed. Reinforced political actors and different institutional forces will seek to assert their hard-fought competences. On the

other hand, for the first time the Council is party to this agreement, and its addition to the process entails many more dealings. It is clear that this agreement should not be a way for the Council to padlock the Commission's right of initiative. While it is obvious that such an agreement could help the EU decision-making process, under no circumstances should it block the political debate.

If some could appreciate the Interinstitutional agreement as a purely technical dossier, it is in the absolute opposite. Indeed, a new Interinstitutional agreement is one of the most important negotiations as it defines how the three main institutions will work together. The fact that institutional aspects fall under the remit of the First Vice-President Frans Timmermans is a clear signal from the new Commission of its high interest in this area.

Stakeholder consultations

The Better Regulation Proposal covers the four stages of the legislative cycle, from drafting to adoption, implementation and ex-post evaluation. The package introduces the possibility of holding consultations throughout the full cycle (including after the Commission has submitted its proposals to the legislators) and more interestingly on the secondary legislation. At first it might seem that this presents more opportunities for stakeholders to promote their interests.

However, one cannot ignore the fact that the time efficiency and therefore the 'betterness' of legislation would be improved. One very political aspect that also cannot be ignored is that once the executive have submitted a proposal to both legislators, comes political negotiations, and therefore excessive expertise and consultations might interfere with the political mission of the legislators. Instead, the Commission could streamline the participatory character of their public consultations with

stakeholders and interested authorities and facilitate even more dialogues in early preparation phases. In this sense, the open web portal where legislative initiatives could be tracked is one very welcome component of the reform. It is a crucial tool for the transparency crusade and was supposed to be in full swing a long time ago. Once in place, it should be updated in real time.

The modifications targeting the delegated and implementation acts need close monitoring. It is neither certain whether the expert groups would easily take on board proposals from the consulted parties nor that the revised common understanding of the delegated acts would appease the European Parliament. Evidently, we will not witness a simulacrum of openness and proficiency. What the Commission sadly left out was the establishment of the transparent register for the delegated acts referred to by Timmermans in his confirmation hearing before the European Parliament.

Transparency and legitimacy concerns also take form in the case of the new Regulatory Scrutiny Board proposed to oversee the impact assessment process. Half of the board will be recruited from outside the Commission. This aspect needs special attention so that interests and non-alignment to Commission staff regulation cannot downplay the credibility of this newly created body. It is important to keep an eye on their ability and willingness to resist daunting lobby pressures, because the question of the independence of the external members of this new Board is extremely vague (see [Article 4 of the decision which implemented the Board](#), which stipulates that 'the members of the Board and the supporting staff shall act independently and shall not seek or take instructions. They shall disclose any potential conflict of interest with respect to a particular report to the Chair, or, in the case of the Chair, to the President'). Indeed, we could ask why the EU executive, whose main purpose is to defend the general

interest, has integrated three external members into this board. On 7 July, the College of Commissioners approved the hiring process and the Commission has begun to look for candidates among existing staff and externally.

The transparency promise

The Commission lent its ear to the voices of civil society when they urged transparency and warned about the EU losing legitimacy and credibility in the eyes of its citizens. However, the transparency lane opened by the new Commission still misses some markers. Therefore, we hope for a fast-paced transparency spillover into the areas where transparency is currently the exception and not the norm. When dealing with access to documents, the EU should have a more automatic and swift system of response that becomes the norm. Sporadic litigations should not define EU transparency. Also, the question of introducing a 'legislative footprint' requires the willingness and involvement of all EU decision-making institutions. The citizens should be able to clearly grasp the legislative flow and be familiar with the contributors who make decisions that affect their lives. The same goes for the Transparency Register, because it's the responsibility of the EU leadership to prioritise making it mandatory and implement it in all EU institutions. This goes hand in hand with the register of delegated acts that should become reality.

What's more, the European Parliament Bureau should engage in developing a new and binding code of conduct that should include clear sanctioning mechanisms for misconduct. While the Better Regulation Proposal commits to more transparency and consultation, the Commission actually needs to clarify and to uplift the concretisation of the European Citizens' Initiative's modus operandi. Otherwise, it will merely represent filler pages in the treaty.

Timmermans also promised greater transparency on trilateral negotiations. The astuteness test that Timmermans has to pass when it comes to trilogues marks the fine line between transparency and efficiency. A true transparency leverage, which could render the EU more legitimate, lies within these trilogue negotiations. Citizens need to be aware of the positions of their political representatives.

However, it seems that the usual transparency watchdogs are not alone in this race, as the constant vigilance of the European Ombudsman is transformed into the long-awaited transparency expectations. On 28 May, her office launched an official investigation into the notoriously arcane trilogues, expecting rapid results. Admittedly, we should not underplay the level of transparency that the EU institutions already offer compared to other organisations and national entities. It is in fact one of the most transparent structures in the world.

Impact assessments and the subsidiarity principle

The subsidiarity principle dominates EU law-making. EU legislation could be deemed unnecessary at the most local level, or on the contrary, could be essential to reach proposed objectives. This gives the subsidiarity principle a dual nature, forcing us to highlight the importance of caution in the EU legislation simplification process. The Better Regulation scanner should not undermine the Internal Market nor its four freedoms, while the impact assessments and the subsidiarity principle tests should always bear in mind the cost of non-Europe as a consequence of non-existent EU legislative initiatives. Finally, one should remember that in the end, the EU level could indeed be the better level at which to act.

The proliferation of impact assessments cannot be overlooked in the Interinstitutional Agreement proposal. It indicates that impact

assessments could be required in the case of 'substantial amendments' tabled by the European Parliament or by the Council. The concept of 'substantial' deserves a clear definition by the Commission in order to avoid discussions, interpretations and its misapplication in practice. Together with the eight-week consultations with the stakeholders after the Commission adopted its proposal, it is likely that these additional impact assessments would burden the political process of law-making and eventually slow it down. Normally designed as tools of support for the legislative process, they should not overload or even substitute for the political character of the EU legislative mechanism. Moreover, impact assessments could be stripped of their necessity. The use of impact assessments by the Council could be used by some Member States as a tool for blocking or 'indefinitely' postponing a proposal.

Gauging the conveyer of EU legislative acts

We could say that some of the concerns expressed by some Eurosceptic parties have been addressed through the Better Regulation Package. However, this push for better regulation also involves the review of all existing and pending legislation. Admittedly, in December 2014, the Commission mentioned that 80 pending bills would be dropped. This is rather worrying for the EU's legitimacy as well as for the Commission's authority and competence.

On April 14, although [the European Court of Justice confirmed the inseparability of the Commission's rights of initiative and of withdrawal](#), it also outlined concrete conditions for the Commission to jettison pending bills from the legislative table. Better Regulation does not necessarily mean less regulation, but rather more efficient regulation. The Interinstitutional Agreement that we will further address also includes a legislation withdrawal provision. It

commits the three institutions to agree every year on the working programme, which should also include the legislative proposals that the Commission would withdraw. We can then safely assert that the spirit of conciliation is paramount to the EU functioning, and prevails over any form of unilateral institutional ambitions.

The push to cut red tape is not entirely dependent on the withdrawal of proposals. Indeed, it could be dangerous to press the delete key for many legislative proposals submitted by the former Commission solely to please certain leaders. The fact that the Commission treats the UK referendum with importance and has created a special task force is already a good step. However, fear of the Brexit cannot limit the EU executive's right of initiative. One should remember that President Juncker explained that 'his' Commission will not be political, but 'very political'. In the same vein, he wanted the Commission to harness its initiative correctly and not behave as a General Secretariat of the European Council. Under these circumstances, the best way to concretise these words is to put legislative proposals on the table, and not to act at the behest of any Member State or electoral momentum.

Conclusion: Better Regulation must go hand in hand with more Politics

Once governments and EU institutions realise that openness, inclusion and participatory democracy creates the best outcome in a political process, the populist fandoms will run

short of arguments and stories to stir up disillusionment and increase euroscepticism. Perceptions of a streamlined EU would water down eurosceptic rebukes and bring solutions for better EU governance.

It is natural to have continual improvements to the transparency, accountability and efficiency mechanisms. Nevertheless, the future of Europe has always been a political project and, like all political projects, it should be supported by public opinion. Consequently, it is imperative for the EU to become a proper political arena with strong political actors in order to have a genuine democratic process at the EU level. In this sense, we can only be sceptical vis-à-vis the aim of the Better Regulation Agenda. It appears to be a tool to rebuild trust in the eyes of EU citizens, but in many aspects it seems to limit the inherently political dimension of the EU decision-making process.

Yet, the Luxembourg commitment to frame its priorities around the interests of the citizen should be a recurrent responsibility for the future rotating presidencies. The EU needs its citizens' support and trust – above all in time of crises that create divisions and scepticism.

Fabian Willermain is Research Fellow at Egmont – Royal Institute for International Relations.

Anca Cioriciu is Project Assistant - Soros Foundation Moldova, part of Open Society Foundations.



The opinions expressed in this Policy Brief are those of the author(s) alone, and they do not necessarily reflect the views of the Egmont Institute. Founded in 1947, EGMONT – Royal Institute for International Relations is an independent and non-profit Brussels-based think tank dedicated to interdisciplinary research.
www.egmontinstitute.be

© Egmont Institute 2015. All rights reserved.